EXHIBIT I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION, on its own behalf and on behalf of EZEKIEL ELLIOTT	:	
VS.	:	DOCKET NO. 4:17-cv-00615
NATIONAL FOOTBALL LEAGUE and NATIONAL FOOTBALL LEAGUE MANAGEMENT COUNCIL	:	

MOTIONS HEARING
BEFORE THE HONORABLE AMOS L. MAZZANT, III
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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PROCEEDINGS

COURT SECURITY OFFICER: All rise.

THE COURT: Please be seated.

Okay, we're here on Case 4:17-cv-615, National Football League Players Association, on its own behalf and on behalf of Ezekiel Elliott, Petitioner, versus National Football League and National Football League Management Council, Respondents.

For the Petitioner?

MR. MELSHEIMER: Good afternoon, Your Honor. May it please the Court, I'd like to introduce my partner, Jeff Kessler, who will be handling the argument for the Petitioner, as well as Ms. Angela Smedley, here at counsel table, as well as John Amoona, both with the Winston Strawn law firm; and Mr. Ezekiel Elliott, as well.

THE COURT: Okay. Very good.

For the Respondents?

MR. KESSLER: Good afternoon.

MR. GAMBRELL: Your Honor, if it please the Court, Eric Gambrell with Akin Gump, and here with me today are my partners Dan Nash, who will be handling the argument today, along with Nathan Oleson and Pat O'Brien of my law firm, along with Adolpho Birch of the NFL.

Thank you, Your Honor.

THE COURT: Very good. Thank y'all.

And I guess the first matter I wanted to address is, I know that, I guess this morning or last -- after I went to bed last night, at some point the NFL filed a Motion to Dismiss.

Of course, that motion is not a ripe motion before the Court, because Petitioners have two weeks to go ahead and file a response to that.

However, the Court still has to take up the issue, we're here on a hearing on the request for TRO or preliminary injunction; but as part of that, the Court still has to address whether it has jurisdiction over the matter.

So I'm not taking up the issue of the Motion to Dismiss, but we still have to address the issue of jurisdiction. So I would like to start with that first.

And, also, if someone could answer the question, because I've been in trial today, has a decision come down from Mr. Henderson?

MR. KESSLER: Not yet, Your Honor.

THE COURT: Okay. So based upon -- does that mean, since a decision has not come down, Mr. Elliott can play this week without -- without the

Court from the NFL. Is that correct?

UNIDENTIFIED PERSON: Your Honor --

THE COURT: Well, you don't have a mic, sir. That's one thing, the acoustics in the courtroom have a lot to be desired, so everyone has to have a mic when they are speaking.

MR. NASH: I can speak to that, Your Honor.

Yes, I believe that is the case.

THE COURT: Okay. And so what is the next, like, timeline, assuming Mr. Henderson doesn't issue a decision? Is that next Tuesday as well, at some point?

MR. NASH: I -- I believe that he will be eligible to practice this week and play in this weekend's game.

Depending upon the timing of Arbitrator Henderson's decision, if it comes out before next week and if it denies the appeal, my understanding is that the suspension would go into effect next week.

THE COURT: Okay. So no matter what --

MR. NASH: That's not an issue.

THE COURT: Right, I understand.

So if he issues any affirmance of the decision by the Commissioner, anything short of tossing

it out, for whatever reason, even if he reduces it one game, that wouldn't impact this week now; it would only impact starting after this game is over?

MR. NASH: That's correct, Your Honor.

THE COURT: Okay. So, the first thing I would like to address is the issue of having jurisdiction over the Motion for -- for the TRO, or the preliminary injunction.

MR. KESSLER: Good afternoon, Your Honor. My name is Jeffrey Kessler, as Mr. Melsheimer indicated, and I'm going to speak on behalf of the NFLPA and Mr. Elliott today.

I will turn to the jurisdiction ripeness standing issues first, since Your Honor would like to address them.

THE COURT: Well, I'm only doing that because the Court can't proceed to take up the question of injunctive relief unless I have jurisdiction, so it is something I will have to deal with, if we get that far.

MR. KESSLER: Completely understood, Your Honor.

And while we had to scramble, as you can imagine, since we received these arguments last night, we filed today at about noon a reply paper which covers

each of these points, but I will cover them now as well.

So, first, Your Honor, the principal argument the NFL made for lack of jurisdiction was based on an entirely false premise, and frankly, Your Honor, one which they should know better about, based on the history between these parties and prior positions.

They present an argument that there's no jurisdiction under the Federal Arbitration Act until after a decision is rendered, and they even go so far as to say, and venue has to be the place of the decision.

Now, that's a very interesting argument except we are not premising jurisdiction in this case under the Federal Arbitration Act, and the NFL knows that. How do I know this?

Because we have been parties in numerous cases together where we both have consistently taken the position that jurisdiction in this type of a proceeding is based on the Labor Management Relations Act, for which there is clearly jurisdiction the moment that a breach of the Collective Bargaining Agreement took place, which has already taken place in this hearing, and that there is no issue of jurisdiction at all.

Moreover, the Labor Management Relations Act provides for venue in any District Court in the United States. So it's not limited to the arbitration

at all.

The FAA is relevant on deciding issues of vacatur. There's a lot of cases, including in this Circuit, that when you are deciding, when you get to the issue of fundamental fairness, for example, to look to case law interpreting the FAA, even in a labor arbitration. But with respect to jurisdiction, the FAA jurisdictional limitations have nothing to do with this.

So what is applicable?

When they finally get to the LMRA, even they do not argue there's no jurisdiction; instead, they make two other arguments.

Argument number one is that you must exhaust your remedies under the LMRA before you go to court; which is not a jurisdictional argument, it's an argument that we haven't exhausted our remedies.

The problem with that argument, as we've set forth in our brief with case law citation, is that what exhaustion requires is that you invoke the arbitral process, which we did; that you go through the arbitration hearing, which we did; that to present the issues to the Arbitrator, which we did; and that the Arbitrator rules on the issues, which he did, that are relevant to our petition.

Because our arguments about being

deprived witnesses, about being deprived documents, about the fundamental unfairness of the arbitration have all been decided by the Arbitrator. The arbitral record is closed, so there's nothing more to exhaust.

And that is all that the case law requires.

Mr. Henderson is not reconsidering, or given any indication he's reconsidering, his issues when he decided that we're not going to get the accuser as a witness; that we're not going to get the Commissioner as a witness; that we're not going to get the documents we requested. So all those issues are in the can and has been exhausted.

If this were not the law, then you would have a situation where you could use this issue of exhaustion as a means of inflicting injury before you even have a chance to get to judicial review.

Had Mr. Henderson's decision come out one hour ago and had we not filed, then the player would have been suspended for the entire week before we could get into court to seek redress. So there's no way that exhaustion of remedies in this case works here.

That's a case where they cited, for example, the ***Pennel*** case, when the Union asserted exhaustion of remedies.

In that case, a player sought to enjoin the arbitration hearing from even taking place. So, of course, that's a failure to exhaust. Akin to that, none of the arguments had been presented to the Arbitrator. In this case, everything was presented to the Arbitrator and was exhausted.

The second argument they make is the Norris-LaGuardia Act. This is another red herring.

They -- to read their brief, you would think that the Norris-LaGuardia Act bars every injunction involving an employer and an employee when there's a Collective Bargaining Agreement in place. That is absolutely not what the Norris-LaGuardia Act does.

As we set forth in our brief, the Norris-LaGuardia Act bars injunctions in cases like a strike or a lockout or something done in the broad collective bargaining process.

It actually was developed, in its legislative history, as protection for unions, because employers were filing antitrust cases to enjoin Union strikes. That's the policies of that.

Otherwise, under Section 101 of the Norris-LaGuardia Act, you are completely authorized to grant injunctions in the labor context as long as you

meet the normal standards for a preliminary injunction. You have to find likely success on the merits; you have to find irreparable harm; you balance the hardships.

The best decision on this that I would commend to Your Honor is the ***Starcaps*** decision, which we cite in our brief, where the NFL made an identical argument. That was a drug suspension policy case with several players.

And the Court went through and basically said, as long as we find the factors that warrant preliminary injunctive relief and this is enjoining the infliction of a suspension on specific employees, not some big NFL policy, not some collective bargaining agreement, the Norris-LaGuardia Act is not a bar at all.

And this is not just one case that's held this. We've gone through this, Your Honor, so we've cited ***Starcaps***, we cited ***Mackey***, we cited ***McNeil***, we cited ***Jackson***. Everyone of these cases, as well as others, have come up in the context of sustaining injunctive relief, sustaining injunctive relief against the NFL.

These are all NFL cases in the context of players being suspended in particular cases, or getting an injunction imposed for antitrust relief on a preliminary-injunctive basis.

So the Norris-LaGuardia Act is not a bar here.

What's left?

They argue that it's not ripe. Well, interestingly, ripeness is a doctrine that you look at not just at the time of the complaint, but you look at ripeness on events subsequent to the complaint.

Now, first of all, we had a ripe dispute because the violation of the CBA, the deprival of the fair hearing has already taken place, and the player has already had that dispute over this arbitration. That exists right now. But, secondarily -- so, it's ripe from day one.

Secondarily, since Mr. Henderson has indicated in an e-mail he sent to counsel today on both sides, that his goal was to issue a decision by close of business today, but that he said it could go a little bit longer because of the volume of materials.

Well, even if he issues it tonight or tomorrow or the next day, all of that goes to your ripeness determination at the time you decide this motion. That's what the case law says. That's what we cited.

So there's going to be no question that this is going to be ripe under any set of standing.

Finally --

THE COURT: So are you -- are you saying that it's not ripe until he actually, "Henderson," issues a decision?

MR. KESSLER: No, Your Honor. I say it's ripe right now, because he already violated the CBA by not providing a fundamentally fair hearing under the LMRA and the player has already suffered that breach, as has the Union.

But if you were to accept the NFL's argument that it should not be ripe until the decision is entered -- so assuming, arguendo, you accepted that, the cases say you decide ripeness not at the time of filing of the lawsuit, but at the time at which you would look at the issue of ripeness on this motion.

And what I'm saying is, by the time you would have to enter a motion (sic) now, especially since the NFL said that Mr. Elliott is playing this week no matter what; you know, next week is an issue, now that they've gone on the record on making that concession -- when you issue your decision, which I would suggest should be shortly after Mr. Henderson rules in the next day or two -- because now, there isn't the urgent need; and it could be tonight, but we'll see when he enters it -- at that point, it will unquestionably be ripe.

Because you, even under their view, would have a completed dispute then under the most extreme view they take. And the case law says you look at ripeness at the time that the decision's made.

All these cases also talk about the fact that when you consider things like ripeness, when you consider things like exhaust your remedies, you're supposed to balance the potential injustice of the Court not acting versus the practical consideration as to whether there's a concrete controversy. And we believe on that record, it will be clear that this is ripe.

The final argument they make, because they make six different arguments about this point, is they also say we have no standing under Article 3.

Well, the case law we cited makes it very clear that injury, in fact, can be incurred or imminent. It can be imminent. Now, why -- we cite a Supreme Court authority on that in our brief. Why is that intuitive?

Well, Your Honor knows that virtually every preliminary injunction case where a case starts that way, the litigant is seeking to enjoin a threatened injury. When the bulldozer is about to invade your property and knock down your house without authority, you don't have to wait for your house to fall down to say you have Article 3 standing.

The imminent injury of that bulldozer plowing forward towards your house gives you standing to seek an injunction against the threatened harm. It gives you standing to go to court. Otherwise, none of this would work.

In fact, there are -- there are many cases where litigants in arbitrations go to court because the employer is seeking to impose discipline before the arbitration even takes place, to try to circumvent the arbitration process. And the courts always find they have standing there.

So none of these doctrines save the NFL.

And, you know, it's quite interesting, because they accuse us of gamesmanship, when what this really is is the NFL's desire to sneak their -- their suspension in and evade judicial review, or to pick the forum of their choice and then argue that, okay, says, you have to go because we beat you to the courthouse.

What we did here was properly assert a claim for a breach under the LMRA that was concrete at the time, it was ripe, the Court has jurisdiction, we had exhausted all the remedies, we had standing, and there was nothing left to do.

So unless Your Honor has further questions about this set of issues, I would propose to

move on to the injunction; but however you'd like to proceed.

THE COURT: Well, let's -- before we go on to the injunction, I'm going to give the NFL a chance to respond.

But I do have a question in dealing with -- in looking at some Labor Management Relation Act cases, now, they are in the employee context, there's case law out there that indicates that you have to exercise the administrative process or grievance system, and then there is a body of case law says that we have -- in those cases, you have to wait till the award or decision on the grievance process.

How -- I know that's not in the same context that we have here, but that is a body of law in the employee context.

How do you factor in what you've done if I look at that body of case law in relation to this case?

MR. KESSLER: So that body of case law involves situations where the litigant did not present the issue to the Arbitrator at all. In other words, it was a litigant who was trying to go to court directly, when there is a requirement to arbitrate, and didn't present the issue to the Arbitrator.

This is the exact opposite situation. In this case, we filed our arbitration. We appeared before the Arbitrator. We presented these issues to the Arbitrator. The Arbitrator ruled against us on each of the issues. So on each of the issues of fundamental fairness that we are complaining about, the record is closed. The Arbitrator has ruled. There's nothing left for us to do or exhaust.

There's not a single case that has ever indicated that exhaustion, that you have to do something more than go to the Arbitrator, present the issues, let him decide.

If Mr. Henderson did not get to decide whether to order the accuser to testify, if Mr. Henderson did not get to decide whether Commissioner Goodell was to testify, if Mr. Henderson did not get to decide the various document issues where we've been deprived, then we would not have an exhaustion. Because the idea is to give the Arbitrator time on those issues, to see if that gives you a remedy.

Well, we've already exhausted that remedy. And what we're here to complain about is exactly the adverse decisions of the Arbitrator.

This proceeding, to be clear, is an attack on the fundamental fairness of the Arbitrator's

conduct in these proceedings. So this can't be a failure to exhaust before the Arbitrator is done.

So some cases, for example, someone goes into court first and says, "Okay, we think this Arbitrator is going to be biased, he should be recused, step aside," but they don't go to the Arbitrator. So the courts say you have to first go to the Arbitrator and argue that to the Arbitrator and then the Arbitrator has it. That's exhausting your remedies.

The Arbitrator then could decide, "Okay, I'm going to recuse myself," and he'll step aside for conflict. If he doesn't, then you have exhausted your remedy.

So, again, I think when you look at every one of the cases on exhaustion, you will find those are cases where the issue wasn't presented to the Arbitrator or the Arbitrator had not yet had an opportunity to provide a remedy.

Here, we are going solely and completely on issues the Arbitrator's already decided and which the record is closed on and it's finished.

THE COURT: Okay. Thank you, Mr. Kessler. I will call you back in a few minutes after we hear their response.

Mr. Nash, you want to give the response

on issue of jurisdiction for the TRO and preliminary injunction.

MR. NASH: Thank you, Your Honor. May it please the Court.

I'm going to start with what counsel just said are the sole issues in their injunction request, and I believe he -- he identified the procedural decisions that the Arbitrator made during last week's proceeding. And one of them you should know, I think we point out in our papers, was in a written decision before the hearing on a Motion to Compel Witnesses.

And so as I understand what he just said, they can come into court now and seek interlocutory review of the Arbitrator's procedural rulings before there is a final award.

I think saying that, Your Honor, makes it absolutely clear how improper and inappropriate not only the Petition here is, but the -- but the TRO motion.

What -- what he just said, I would submit respectfully, is akin to Your Honor conducting a trial; during the trial, making various evidentiary rulings about documents and evidence and witnesses; and -- and the case comes to a close; and at the end of the case, counsel makes the closing argument -- and which is what we did, which we had last week -- and the case is

submitted, whether it's to a jury or whether it's to a Judge, and before that decision is rendered, they can run to the Court of Appeals and say, "We've done everything, those rulings have harmed us, and we now have a ripe dispute to -- that the Court of Appeals can weigh in on."

I think saying it proves the point. Quite obviously, that's not something that is permissible.

And the main reason --

THE COURT: Those aren't really comparable examples; because there's a whole bevy of relief where things can happen in a civil context in a case, if a case is submitted to the jury versus -- and other relief.

Here, they're asserting that if a decision is issued -- now, of course, we're past the window for this week; but if a decision is issued, even if he's immediately suspended, or if that's affirmed, any part, he's going to be band from practice and such.

So it's not the same situation about trying to -- I just don't think it's the same. I understand the example, but I just don't think it's equivalent to what we have here.

MR. NASH: Well, I would -- I would -- I

would suggest, Your Honor, that it is the same in the sense that one of the reasons, whether it's in court or in arbitration, you don't even get to interlocutory review of those kinds of rulings, is that they could get all of the relief that they ask for.

He's right, we don't -- we don't have a decision. It is quite true that the Arbitrator could uphold the suspension. But just last week, counsel asked him to, based on the very same arguments that they have made in their petition, to either reduce or vacate the suspension. And that's critical, I think, for the standing and jurisdictional question.

Now, let -- let me go back to what he said at the beginning, because I do think it's important for -- for Your Honor, in terms of resolving this jurisdictional question, as a threshold matter.

At the end, he said they filed an action under the FAA; but at the beginning, he said, our principal argument with respect to jurisdiction was based on the FAA, and I think he was somewhat critical of our papers.

Let me be clear, our papers addressed what they said in their Petition. In the very first page of their Petition, they -- they -- they were seeking to vacate a future arbitration award under both

the FAA and the LMRA. And the last page of their Petition, their only prayer for relief is to -- is for the Court to vacate the future arbitration award under -- under the FAA and the LMRA.

So, of course, in filing our papers, we address both of those statutes, and I think we demonstrated -- and I don't know if Your Honor has had an opportunity to read them -- but I think we demonstrated --

THE COURT: I have.

MR. NASH: That under either, under either, I think the law is clear that there's no jurisdiction, there's no standing, there's no ripe controversy for a litigant to come in and seek judicial review of an arbitration proceeding before the award is issued.

THE COURT: So what happens if he issues the award tomorrow? So then this case is ripe, under your view?

MR. NASH: If -- if -- if -- if --

THE COURT: If Henderson issues a decision tomorrow -- apparently the parties thought he was going to -- y'all thought he was going to issue it today; he didn't. So if he issues it tomorrow, isn't the dispute then ripe --

MR. NASH: I think --

THE COURT: -- for the Court, before this Court?

MR. NASH: Well, I -- I -- I think we're talking about different things, so maybe I should -- I should break it down. Let me first talk about jurisdiction, because I think that that's the most important point to make.

And I am going to take counsel's point that this case is governed by the LMRA. I completely agree. He cited the position we've taken in other cases. I completely agree, this case is absolutely governed by the LMRA, including the exceedingly narrow standard of review that we'll get to when we get to -- if we get to the merits of their -- their TRO request. But under the LMRA, he said it's not jurisdictional.

Well, I think, Your Honor, on Page 7 of our brief, we cite the Circuit cases that say that it is.

So I don't agree. I think it is completely jurisdictional. I think the law -- and this is an area of law -- and let me -- let me just say this about this argument, as well as a number of the other points that I think we try to make in our briefs and we may be interested in today.

I don't know that there is an area of law, Your Honor, that is more well-settled, that has more Supreme Court decisions on -- on the review of arbitration awards, on the propriety of doing what they're trying to do here.

It's been answered by the Supreme Court; it's been answered by the Fifth Circuit; and as we point out in our -- in our briefs, it's been answered in every case that where -- where the Players Association or a player has tried to challenge a suspension or challenge the collectively-bargained disciplinary appeals process in imposing a suspension. And every single time, every single time, it's been rejected.

But as far as the jurisdictional question, I think the law is quite clear that it is jurisdictional.

Now, as far as this argument goes, well, all you have to do is -- he distinguishes the ***Pennel*** case. And I would commend Your Honor to -- we cite the position that the Players Association took in the ***Pennel*** case this last year, and it's not quite, I think, how he described it.

He said, well, you have -- the cases that we're relying on are just situations where the employee didn't pursue or the Union didn't pursue arbitration at

all. That's not -- that's just simply not the case.

And, in fact, what they said on Page 5 of their submission, and it's cited at Page 8 of our brief, what they said last year to a different Judge, Your Honor, is that Plaintiff has failed to exhaust his administrative remedies, further compelling dismissal. Dismissal, jurisdictional. You can't come into court and sue under the LMRA if you haven't exhausted your administrative remedies.

And that means you have to not just pursue arbitration, you have -- you can't start an arbitration and then say, "You know, I'm not happy with the way it's going. I might win, but I might not win. I'm going to run to court." That's not exhaustion under any -- under any of the cases.

And, in fact, Your Honor, they don't cite a single case that supports that argument, not -- not a single case. They cite one case, I think the ***Frost*** case. But in that case, the case had gone through to an award, and -- and there was no claim that the employee hadn't exhausted his remedies.

They don't have a single case -- and you can go from the Supreme Court on down, Your Honor, I mean, this is just a bedrock principle of labor law, and that's why they told the Judge in Ohio last year that --

you know, a very different story.

And, in fact, what they said is, as to the point that you just made about, well, what happens if the Arbitrator rules tomorrow, but they said, the player -- the player is not suspended now -- I'm quoting them at Page 7 of their brief, "Player is not suspended now and will not be suspended until and unless the Arbitrator hears the appeal and issues an award affirming the discipline. As such, Plaintiff's claim of irreparable harm is not ripe and may never be."

That's what they said last year, Your Honor, on ripeness.

So --

THE COURT: Remind me in the ***Pennel*** case. Was it dealing with the same situation of assertion of unfairness in the procedure?

MR. NASH: It was -- it was -- I would argue it was very similar. It was a player who individually was dissatisfied with -- with -- with his case. He went to court before the -- before the arbitration.

He actually sued both the -- the League and the Players Association, which is why they had to take a different position than they're -- they're taking now.

But he was making the very same kinds of preemptory challenges under -- under Section 301 of the Labor Management Relations Act before an award is issued.

So, I -- I -- Your Honor, I just don't think it could be clearer -- and I actually have copies for the Court's convenience of their written submission, if you would like to look at it, because it is -- it is quite remarkable, it's quite remarkable the extent to which they made, last year, the arguments that they're making this year.

What an interference with the public -- they actually said the relief there would undermine public policy concerning judicial deference to labor relations, as well as to enforcing arbitration agreements according to their terms.

So, the contrast, Your Honor, could not be more stark. And that's true for -- for the jurisdictional question. It's true for the ripeness question.

And I think when we talk about standing, I don't know -- I know that courts normally want to get to Constitutional questions last. I think if there's another basis to rule, there's not a need, I think, to get to the Constitutional question. But there is no

case or controversy here.

This -- this -- this example that he talked about of imminent harm is completely undermined, it's undermined by the -- the obvious fact, the obvious fact that they could win.

So when they say things like they said today in their reply brief, that there's nothing that the Arbitrator can do to remedy their fairness arguments that they're asserting in support of this lawsuit and injunction request, this is -- this is not correct. They could win.

And, again, I think it's --

THE COURT: Nobody can fix the procedure errors that they're asserting. I mean, they're asserting that because the procedures to be fundamentally unfair, the Arbiter can't fix those.

MR. NASH: Well --

THE COURT: Those -- those have already happened.

MR. NASH: They -- well -- but they're claiming that because of the procedural errors, it has prevented Mr. Elliott from having a fair hearing to overturn his discipline.

If the Arbitrator, for whatever reason -- and I think this is sort of, again, another bedrock

principle, judicial principle; it's not arbitral -- it's certainly not arbitral -- if the Arbitrator can give them all the relief that they are requesting, then I would -- I would -- I would submit that there is no harm, there is no imminent harm, there's no harm at all, and there is no case or controversy.

It's not -- this is a -- this is an important principle that courts guard against, I think, Your Honor, and I think it's -- it's quite important here.

And as far as getting a remedy, and I'm going to -- I'm spilling over a little bit into the -- sort of the merits of their claim; but remember, their -- the other thing that I think we all have to keep in mind in this case, because there's a lot of allegations getting thrown around, but this is an action that has one prayer for relief.

The only prayer for relief, it's not to fix the procedural rulings, it's not to stop the Arbitrator or force the Arbitrator to change what he did. So, it's not -- it's not a question of -- they're not asking you to tell the Arbitrator to do something different. They're seeking to vacate his award, that hasn't even yet issued. And -- and the -- so again, I think it makes obvious how -- there's simply no

jurisdiction and no controversy here for you at this point.

And as far as whether he does it tomorrow or he does it -- Your Honor, that's always the case. This is -- that's a temporal issue. I mean, they're -- they're free to file a proper action. And -- and -- and let's -- let's put into context here what they are really saying.

So if -- if they can only -- if it takes them another day or two to get to court and -- and -- and Mr. Elliott misses a practice or something, that's imminent harm that warrants prematurely involving the Federal Courts in what I would suggest is an interlocutory, internal arbitration process?

That, again -- I think the other side to this argument, that we haven't talked about, is how, if you consider the merits of what they're claiming -- and, again, it's -- it's -- these are arguments seeking to vacate the ultimate award -- they are completely foreclosed by the LMRA, and I can address those.

THE COURT: Wouldn't you agree with me that the procedural issues they're raising, that record is complete. There is nothing else in terms of anything developed, and really nothing that the Arbiter can decide unless he throws the whole award out, I mean, if

he vacates it completely.

But no matter whether he reduces it or affirms it, everything that the Court has to decide in terms of what's being asserted in the Petition are the defects or procedural errors, there's nothing else that has to be decided to decide that issue.

That's all before the Court, is it not?

MR. NASH: I don't think it is, Your Honor.

THE COURT: So what's not before the Court on the issues they're raising?

MR. NASH: Well, I think you -- I think you just had a little misdirection, to be honest with you, Your Honor.

I think what they are throwing around in this Petition is this idea that suspending Mr. Elliott would -- would be unfair. Okay, they talk about fairness.

And we spent three long days last week, all of us in New York, before the Arbitrator presenting --

THE COURT: I spent my weekend reading it all, so...

MR. NASH: And -- and, Your Honor, they submitted the issue. So -- so let's start -- I think

it's important to be specific about what they're complaining about.

The first point that they're challenging --

THE COURT: We don't have to talk about the merits of those, but just in terms of --

MR. NASH: No, I think it related to your question.

THE COURT: Go ahead.

MR. NASH: So -- so the principal, the principal argument I think that they're making is, they filed a Motion to Compel before the arbitration proceeding and they argued that the -- that Ms. Thompson should have been compelled to testify, okay. And we had a hearing about that.

And -- and the Arbitrator issued a written decision, making a number of points, and -- and concluding that under this Collective Bargaining Agreement, he was not persuaded that -- that that was appropriate. That's one of their main arguments.

In closing, okay -- and really their entire, their entire argument about the suspension from the beginning, was -- was to challenge the credibility of Ms. Thompson, okay.

And in closing, Counsel right here argued

you should -- it's not fair to -- to discipline if we don't get to confront the accuser. So they have made that argument. They have made that argument. And it is something that is under advisement by the Arbiter. I don't think it has any merit.

And if we get to the LMRA standards for your review of the decision that the Arbitrator made on the Motion to Compel, there's no basis. And the courts have repeatedly said that -- from the Supreme Court, again, on down, that procedural questions, like, what witness gets to testify and what documents or discovery is appropriate, those are for the -- for the Arbitrator to make. And even if the -- even if the Court disagrees, those cannot be second-guessed absent some sort of misconduct. Okay?

So absent a situation -- the *Gulf Oil* case that is really is only one of the cases they can point to where the Arbitrator refused to hold a hearing. Okay, I get that.

But there's no dispute here that Mr. Elliott had the hearing. He got to present numerous witnesses. He actually, through witnesses through affidavits were accepted into evidence by the Arbitrator, and he got to argue it wouldn't be fair without the accuser appearing.

So I would submit, Your Honor, that no, this is not the time. I think you have to -- at a minimum, a court would have to have an award to look at and understand what the basis of the Arbitrator's ultimate decision is.

So I just don't -- I don't -- and that's true for the other -- other arguments that they're -- that they're making here. And, in fact, one of the arguments is -- is -- is just -- is really completely the basis of their -- their appeal to reduce Mr. Elliott's dismissal. We -- we don't know what the Arbitrator is going to do.

I don't know -- I argued against. I argued that it was just wrong. I don't think it was either appropriate for Ms. Thompson to be -- first of all, the NFL -- she is not employed by the NFL. The NFL can't force her to testify. I don't think under the Collective Bargaining Agreement that applies, and this is well established that -- that she should be compelled, particularly in a case like this --

THE COURT: Well, we will talk about that in a minute.

MR. NASH: Yeah. But so --

THE COURT: Let me give them an opportunity to speak first on the merits.

MR. NASH: Okay. Sure.

But unless you have any other questions...

THE COURT: No, I don't have. Thank you.

MR. NASH: Thank you.

THE COURT: And then, Mr. Kessler, do you want to respond to all the jurisdictional arguments before we --

MR. NASH: Only -- only to two.

THE COURT: Go ahead.

MR. KESSLER: So, Mr. Nash talks about the ***Pennel*** case, that's the case last year in which the NFLPA was a defendant, as well as the Management Council, and said that shows how we should apply the exhaustion of remedies.

Well, it does, but not in a way that Mr. Nash would like it.

So in that case, to be very specific, there was an arbitration that should have gone forward to review a drug suspension.

And the player argued there were only two arbitrators available to select from, when the Collective Bargaining Agreement, in his mind, said there should be three.

And he went into court and said, "I don't even want to go to this Arbitrator -- or have an arbitration, because there should have been three, not two."

In that context, yes, the Union's position was, and would be today, that you have to first go to the Arbitrator and say, "The Collective Bargaining Agreement provides for three, there were only two," and give the Arbitrator a chance to rule on that specific procedural defect.

That is why there was no exhaustion in that case.

This, again, is the opposite case. And Your Honor said it very well, says the Arbitrator's ruled already on these -- on these issues; twice he's ruled on this.

And Mr. Nash is wrong. These issues are not before the Arbitrator right now. What's before the Arbitrator right now is his ultimate decision on the merits of the arbitration. But he has rejected all of the things we are complaining about, the fundamental fairness, and it can't be fixed.

Your Honor is correct: You have everything you need as a Court to decide that issue right now.

The only last thing I'll say in response to this is, Mr. Nash said, well, we didn't cite any cases where there wasn't already an award issued.

In fact, that's wrong. Right on Page 2 of our brief, we cite a case where the Plaintiff tried to do an arbitration and the arbitration never took place, and the Court said he had exhausted simply by trying to do the arbitration and had tried to invoke the process, even though that process never went forward at all.

And that is the case, I believe, of ***DelCostello versus International Board of*** -- ***of Teamsters***.

And what the Court said there -- that's a Supreme Court case; a pretty good case, says Plaintiff must attempt to exhaust any grievance arbitrations provided in a collective bargaining agreement before seeking relief in Federal Court.

And actually that -- I can't tell from the citation -- no, I think that is ***DelCostello***. You will forgive me, Your Honor. It also might be ***Scott versus Anchor Motor Freight***. Since we put together this brief in literally two and a half hours, I'm not sure which of the two cases. But the point is here, we have given you citation that even when the process doesn't

happen, as long as the Plaintiff made the required steps to exhaust, after that, the exhaustion issue is over.

So unless Your Honor has further questions, I think I've covered this subject, and I will move on to the TRO issues.

THE COURT: Yes. Because, I mean, I'll have to decide that threshold issue, but we will go ahead and proceed with the argument on the injunctive relief.

And I believe that both sides were all in agreement of what is before the Court and what is not, in terms of what the Court has to decide, and it's not the issue of credibility or what happened or not happened, it's about the -- whether the proceeding was fundamentally fair or not. That's the question before the Court, if I reach that question. So...

MR. KESSLER: You have said it very well, Your Honor. The issue here is whether or not the basic standard, which every labor arbitration in this country must go through of fundamental fairness has been applied in this case.

And the importance here is that this principle applies, it's well established in the Fifth Circuit, no matter what the Collective Bargaining Agreement says, they like to argue -- and I'm sure you

saw it in their brief, and you will hear it again -- well, we should have bargained for fundamental fairness in the Collective Bargaining Agreement, and where is the provision that says you're entitled to confront your accuser in a case like this? They go, it's not in the CBA, so therefore, we don't get it.

That's not the issue. We're not asking you to second-guess the CBA. We're not asking you to go into the findings of facts. The issue here is uniquely for the Court. That's what the Fifth Circuit said in ***Gulf Coast Industries***; it's still the leading case on this in the Fifth Circuit. Which is that there must be a fundamentally fair process.

You know, because we're in a rule of law where there -- where basically for Federal Courts to allow arbitration to be the exclusive remedy. And as Your Honor knows, the courts today give broad scope to arbitrations. But underlying that is the fundamental requirement that it must meet basic standards of fairness.

So what's very significant here, Your Honor, is that the issue must be looked at in the context of the specific arbitration before you. In other words, there is no abstract right. In other words, I wouldn't say that in every possible case you're

entitled to every possible witness as an issue of fundamental fairness. That's not the issue.

The issue is, in this particular case for this particular policy in the context of the issues here, what did fundamental fairness require. And that's where I'm going to go to.

And, Your Honor, we're starting first with the -- with the preliminary injunction standard of likelihood of success on the merits.

I know Your Honor knows these standards very well. You -- you articulated them exactly right recently in the ***Dickey's Barbecue Pit*** case, so I am not going to purport to tell you what the standards are.

And you know from your review of the case law that likelihood of success doesn't mean that we have to show we're entitled to summary judgment now. What we have to show -- and this is what I'm going to get to -- that in order to preserve the status quo, which is all, by the way, we're seeking to do: a status quo injunction.

So, Mr. Elliott has been playing for the Cowboys for the last year, even though he's been under investigation, even though this has all gone on, we're simply seeking to maintain that status quo until Your Honor can decide the ultimate question in the case,

which is whether or not this arbitration was fundamentally unfair and therefore must be vacated.

And interesting, Mr. Nash said, well, the only relief we're seeking is to vacate the arbitration. Well, let's be very clear. If you vacate the arbitration, the suspension does not ever go into effect. And so that it's not like vacating the arbitration is some abstract proposition.

The way in which the CBA is set up is so when the Commissioner imposes discipline, it has to be subject to an appeal. And if the appeal was improper, then there's no suspension in effect.

Now, I guess the Commissioner could try to start over and do something again in the future; but this suspension would never go forward if you vacate the arbitration. That's why -- that's why this is so important.

So our preliminary relief is simply to give the Court the time to decide these complex, important, difficult questions, which are worthy of judicial review, to ensure fundamental fairness. And I use those words because those are the words from the Fifth Circuit case law that's in our brief.

So we don't have to show we're definitely going to win or even that it's overwhelmingly likely

we're going to win, we just have to present substantial, difficult, important questions for review, if we satisfy the other elements of the preliminary injunction.

So let me talk now about likelihood of success in this context, but with the view that all we have to show are there substantial questions there.

First of all, I start with the denial of the right to have Ms. Thompson come in and testify and be subject to cross-examination.

As I said, that issue has to be decided in the context of this specific case. So what does the record show? And you have a complete arbitral record before you. What does the record show in regard to that?

First of all, we have a player who has not been criminally charged, certainly not been criminally prosecuted or convicted. And under the Personal Conduct Policy that the NFL promulgated, they put in a special requirement -- doesn't exist if you have pled guilty or if you've been prosecuted and you've done a plea agreement, it doesn't exist -- but when that doesn't take place, they said there must be, quote, credible evidence to support the charges.

And I would say, by the way, that it's a very important requirement, because it's a recognition

that if the authorities didn't see a reason to go forward with anything and you have no admission from the player -- in fact, you have here the most strenuous denials under oath -- there needs to be credible evidence before you wreck this player's career, before you wreck the team's competitive abilities, before you intervene in this way.

So the Arbitrator's decision was: Did the Commission of Discipline comply with the policy in a fair and consistent way upon which the player and the Union had the burden of proof. And that's very significant now, Your Honor.

How are we going to be able to fairly discharge our burden of proof to challenge the essential issue of credible evidence if you can't present the accuser in the hearing to be cross-examined, so that just as the Arbitrator got to see Mr. Elliott testify for hours and hours, he also will get the accuser to testify and be able to do that.

Now, the NFL sort of makes two arguments about this, or they made it to the Arbitrator. One, they said, well, we don't control her. You know, she's like an independent person.

Well, the problem with that, Your Honor, is that they didn't try, and no one asked them to try,

even though she voluntarily was interviewed by them six times; she voluntarily gave them her cell phone to be examined; she did everything they asked for this.

So we have every reason to believe that had the Arbitrator said, "You have to ask this witness to testify," that she would have said yes.

And I asked Ms. Friel, who's in charge of this whole disciplinary process, whether or not she was aware of any efforts made to even ask the accuser if she would come in and do this. And, of course, the answer on the record was no, there were no such efforts.

And the reason there were no such efforts is very obvious. I asked Ms. Kia Roberts, who was a very truthful witness in this proceeding, very truthful witness, who is the Director of Investigations, whether in her nine years as a prosecutor she had ever presented a witness with so many credibility issues as Ms. Thompson had, for being subject to cross-examination in a case, did she ever choose to have such a witness, in her entire career as a prosecutor of nine years, and her answer was, "No." Okay? Her answer was, "No."

And that goes to why this witness, had she been available, we are convinced would have been essential to our ability to go to this issue of credibility, which is at the essence of this

case-specific issue. There may be cases where the League never interviews the witness and doesn't -- the accuser, and doesn't rely on it.

Here, virtually the entire complaint, the entire discipline is based on the allegations of Ms. Thompson.

Now, it's interesting because the Commission of Discipline letter says, "Well, I knew she had credibility issues, so I rely on other things."

But when you look at those other things -- and we'll do this when we get to the Petition to vacate -- they don't possibly fill the gap here, they don't possibly -- other things they rely on is they got two doctors to ultimately say that perhaps the pictures of injuries she had could be consistent with several alternative causes, but they couldn't really reliably date when they were from, in any event. That's the forensic evidence they had to try to say they weren't relying on the accuser.

It is crystal-clear: If you don't rely on the credibility of this accuser, you couldn't possibly meet the credible evidence test. And we didn't get a chance to cross-examine her, to have her as a witness, to have the Arbitrator see that.

Secondarily, to compound the injury, they

refused to produce the notes of the investigator who interviewed her six times.

Now, the reason this is important is not just, of course, they have said things that weren't recorded. Out of the six interviews, two were transcribed and four were not. So four, whatever we know about them, is not based on a transcript. But even when you have --

THE COURT: Mr. Kessler, you know, Ms. Roberts testified that two of them were interviews and then she said the other four were follow-ups.

MR. KESSLER: Yes, Your Honor --

THE COURT: The nature of -- they weren't -- it seems like they weren't full-blown interviews.

MR. KESSLER: What she did in her testimony, is first she said two were full interviews and four were follow-ups.

When I questioned her and pointed out that she wrote that there were six interviews in her report, she ultimately answered and said, "Yes, I guess they're interviews."

So I don't want to quibble over words, but she was distinguishing between follow-ups, you know, as opposed to the basic interviews.

But the follow-ups were clearly, and Your Honor can look at them yourself, were interviews extensively about different issues that went to her credibility. And, in fact, frequently the follow-ups were Ms. Roberts' probing about the inconsistencies in her testimony.

In other words, the reason she did the follow-ups, in part, is because Ms. Roberts had so many doubts about the credibility of this witness, that she kept going back and saying, "Well, this person, who was a complete neutral, said this. What do you have to say to that?" Or, "This person is inconsistent with what you said the first two times."

So, for example, in her first two big interviews, she never mentioned one of the five alleged incidents at all, at all. It didn't come up until one of the follow-ups that was there. Which also, of course, goes to credibility.

My point here is, the investigator's notes would have not just the words she said, but the contemporaneous impressions of the investigators.

Because, if you know experienced investigators, they would write "Inconsistency." "Doesn't seem credible." You know, other points that would have perhaps, perhaps cured a little bit of the

harm, and really wouldn't have overcome the harm of not having her.

But the combination of denying both in a case -- in a classic he-said/she-said case, and a policy that requires credible evidence where the Arbitrator is going to rule, as Mr. Nash said, he's going to rule on whether or not she was credible, we know he's going to rule on that in this hearing, and he's going to do it without seeing her, without her being cross-examined, without anything else, it utterly defies fundamental fairness. So that's number one. And it's occurred now. It can't be fixed. It's been denied twice.

THE COURT: Well, Ms. Roberts got to testify, so the Arbiter certainly had the opportunity to hear her and what her views were and what her opinions were in deciding that. Because I don't think the Commissioner, he never actually saw live testimony from anybody.

MR. KESSLER: That is absolutely correct about the Commissioner.

But with respect to the Arbitrator, we heard Ms. Roberts give her testimony, and I will talk about that in a minute.

And you also heard Ms. Friel separately say, well, ***she*** thought that it was credible for all but

one of the five incidents.

So, really, that's not a substitute, that's not a substitute for the Arbitrator being able to decide whether there was credible evidence in this case. And it's certainly not a substitute for my being able to cross-examine this witness about many things, for example, that may speak -- that she wasn't even asked by the investigators but which would go directly to whether or not --

And, a lot of times, the issue on these appeals to the Arbitrator is whether you can induce new evidence that the Commissioner did not even have before it, because I will come to this next.

Their big argument to Mr. Henderson in everyone of these arbitrations is that you should defer to the fact-finding of the Commissioner, and only disturb it if it really is arbitrary and capricious. That's Mr. Nash's favorite refrain in his closings and all of his arguments about that.

Well, how can the Arbitrator decide, how can we argue what you should defer to if you don't know what the Commissioner actually knew? And this is the second point.

When it became clear that Ms. Roberts' conclusion -- which, frankly, was somewhat, as you might

imagine, earthshaking, came out that not only did she think, quote, that the accuser had credibility issues, but that in a review of all the evidence by the Lead Investigator -- and I call her the Lead, because Kia -- Kia Roberts was the investigator who interviewed all 26 fact -- fact witnesses; Ms. Friel interviewed none.

Kia Roberts is the one who ran this investigation. She's the one that knew all the evidence. She was the co-author of the report. And she concluded there was insufficient evidence to pursue any violation at all. But that was not put into the 168-page investigative report.

Now, that then raised, well, what did the Commissioner know? Because she did not get to meet with the Commissioner. And this is undisputed. There was a meeting with the Commissioner to discuss the findings of the investigation in which Ms. Friel went and expressed her view that she thought that there should be a prosecution, that she did think it should go forward. And Ms. Roberts, the one who interviewed all 26 witnesses, was excluded, not invited to that meeting.

And she testified she doesn't know why she was excluded. She doesn't even know who made the decision. She certainly thought it would be important to talk to her.

Even more telling, more telling under the PCP policy, they have four advisors who -- and it could be four -- but they have expert advisors who are supposed to review what happened and give the Commissioner advice whether to impose discipline. That's another part of the process.

So you have the big evidentiary report. And in that report, 168 pages, and, by the way, thousands of pages of exhibits, there's no conclusion.

Why is there no conclusion? Because if Kia Roberts had to write a conclusion, she would write, "I conclude, don't go forward." And they didn't want anyone to know that.

So you get down to the meeting of the four expert advisors. Ms. Friel is in attendance, but not Ms. Roberts. She doesn't know why she's excluded from that.

And why is that important? Well, the expert advisors are going to advise the Commissioner, right?

So, Mary Jo White, who is a former U.S. Attorney, former head of the SE -- Chair -- Chair of the SEC, someone who knows what questions to ask, asked Ms. Friel at this meeting of the advisors, the only meeting of the advisors we believe took place about this: Can

you tell me not that what you, Ms. Friel, conclude; she says, can you tell me what did you and your investigators include -- conclude about the credibility of these allegations and what the evidence show?

And Ms. Friel flatly misrepresents the truth to the four advisors. Flatly. What does she do?

She says, oh, July 22nd, one of the five incidents, we thought was incredible.

Well, she had to say that, because there were e-mails showing that Ms. Thompson had asked her friend to lie to the police about that incident. Not a very credible way of alleging an allegation of abuse.

So she said, that's fine.

Then she goes, as for the others -- because Mary Jo White says, well, what about the others? As for the others -- and Your Honor should read this -- it's a big question.

THE COURT: I have read it.

MR. KESSLER: And you know, she never answers what should have been the answer, what would have been the answer had Ms. -- had -- had Ms. Roberts been in the room, Ms. Roberts would have said, Well, I personally concluded in my investigation, we didn't find any of it to be credible.

Maybe Ms. Friel would have disagreed, and

then the four advisors could say, well, you're the one that interviewed the 26 witnesses; and you're not. What causes you, Ms. Friel, to draw a different conclusion? And then they would be in a position to tell the Commissioner what happened. But they were cut off, too.

So then -- and this is the most incredible stuff of all. So we get to this issue of what did the Commissioner know? And I commend Your Honor -- actually, I shouldn't commend you; it's a hard duty -- to read the testimony of Ms. Friel in this.

Ms. Friel is an experienced prosecutor herself. She's a trained lawyer. I submit to you she understands questions. She knows the significance of the oath. She knows how to testify. Okay?

In the space of eight minutes of examination, she changed her testimony five to six times as to what the Commissioner was told. She gave every variation from "I don't remember," to "I said something about credibility," to "Maybe Ms. Kia Roberts said something about credibility," to "I don't actually remember what was said," to "Attorney-client privilege," to "Oh, yes, I told him about Kia's conclusions."

I mean, you look at that mess. Talk about inconsistencies and incredible testimony. And, again, Your Honor, just read it, just read it.

If your clerk goes through it, you're going to be scratching your heads, "Say what!" This changes every two minutes.

And I ask, I ask --

THE COURT: Mr. Kessler, so it's clear, I have read it myself.

MR. KESSLER: Thank you. I apologize, Your Honor.

THE COURT: You want to see my transcript, I have marked those passages.

MR. KESSLER: You will see then -- you will see that I asked -- finally, I got exasperated. I said, "Well, you seem to have suddenly changed your mind about what you remember from a few minutes ago. Did it suddenly pop into your head?"

And her answer as a trained lawyer was, "Well, my testimony speaks for itself." Okay.

Now, because of that uncertainty, we needed Commissioner Goodell. Because Commissioner Goodell could have told us, here's what I knew. Did I know that Ms. Roberts had reached this conclusion or did I just know that there were credibility issues?

In the -- in their brief and in the public statement issued by the NFL in the last week, what they say is, "The Commissioner knew everything."

Why? Well, because all the facts are in the report. And, of course, what's not in the report is the conclusion of Ms. Roberts. So the report is useless.

And this argument is, well, the Commissioner could have read the 3000 pages of exhibits and the 168 pages and all the backup and had reached his own conclusion.

That's very different from the process when you hire experienced criminal prosecutors to do an investigation, to give you advice, and you have four expert advisors and you expect them to know what's going on, and to have all that, that's very different from what's in the report.

And, number two, they say, well, I heard there were credibility issues. Credibility issues as Ms. Friel said, as she told the Commissioner, there was credibility issues with everybody, so, therefore, you can't decide on that. So here's another basis to impose discipline.

So when you needed to know -- because the argument, and I guarantee you as I'm sitting here now -- I give a lot of guarantees, okay -- when you see this decision, whenever it comes out -- right now, the next hour, tomorrow morning -- it's going to have a long discussion about the standard of deferring to the

Commissioner, his fact-finding, and how we have to show that his fact-finding is arbitrary and capricious.

How could we meet our burden on that argument when we can't demonstrate, well, the Commissioner didn't know any of this, it's new; so, therefore, you don't defer on that at all. That's what we needed to be able to do in this hearing, and we were deprived on that as well.

So we believe under the fact-specific standards of fundamental fairness, the combination of these issues, okay, the combination of not knowing how this conspiracy suppressed evidence of Commissioner Goodell and what was involved and the scope of it, or what he knew, and the inability on the fundamental issue of credibility, this goes to fundamental fairness.

At the very least, Your Honor, at the very least these are significant, difficult, important questions that are worth maintaining the status quo until you can have a whole hearing on these issues with full briefing and discussion.

Obviously, we filed a 15-page TRO brief and a Petition, but we have not yet fully briefed here today, the full scope of these issues, which you are entitled to do. So that's on the likelihood of success.

The other aspects of preliminary

injunction here, frankly, Your Honor, are overwhelming and compelling. First, is irreparable injury. I don't even know how they seriously contest this.

So we have cited to you decision after decision after decision. I'm going to read to you the list that's in our brief. ***Brady***, ***Starcaps***, ***Virginia Squires***, ***Jackson***, ***Bowman***, ***Haywood***, ***Linseman***, decision after decision that recognize that when a professional athlete is going to miss games, this is inherently irreparable. Why? Because these careers are short.

God forbid, Mr. Elliott could go down to an injury at any time. You can never recover these lost moments of competitive opportunity, number one.

Number two, Mr. Elliott last year was in the Pro Bowl his rookie year. Wouldn't it be incredible if he could be in the Pro Bowl two years in a row; or try doing that when you're missing six games, which is almost half the NFL regular season. That might be too much even for Mr. Elliott to try to achieve. All of those honors, that recognition is lost. No money can make that up.

The possibility of getting to the playoffs, going deep into the playoffs, getting to the Super Bowl, perhaps this is the Cowboys' year. I know I have a few people back here that would like that to be

the case. Okay?

That opportunity in the NFL comes up briefly for a moment. You don't know if this would be the Cowboys' year, with their star running back for all 16 games, as opposed to not having him for six of these games at the start of the NFL season. So that's why case after case after case say this is irreparable in terms of that.

That goes beyond even the fact that, obviously, being suspended, you know, it's like Your Honor knows this, when someone, you know, gets convicted of something, that gets a lot of press, okay; when you get acquitted, not so much.

So the damage to Mr. Elliott's reputation of letting it go forward, that Mr. Henderson has -- if he has, and I believe he will likely do this, says fine; because when we're deprived of our opportunity, he will probably sustain the discipline; because we didn't get a chance to cross-examine the witness, because we couldn't depose the Commissioner because of the high deference standard he's going to apply, that's reputational harm, that is very hard to ever get back again, in terms of this.

He was vindicated by the police going forward. As a matter of fact, the police didn't just go

forward, and the prosecutor, they said because of the conflicting evidence and accounts on all incidents; in other words, insufficient basis to conclude to go forward. Now, I'm not saying a criminal standard applies, it sure doesn't; but credible evidence applies, and that's what we need to go back to.

So, I think irreparable harm is self-evident here. Mr. Nash wants to spend time to argue this, that's his choice. I don't think it's a close question. Then you get the balance of hardship.

Balance of hardship is very important. Because what the case law says in the Fifth Circuit, as you know, is that if the harm to the Plaintiff here, Mr. Elliott, is going to be irreparable, and the harm claimed by the adversary is something that could be easily remedied if it turns out that the injunction should not have been granted, if, in fact, you decide to affirm the arbitration, says then the balance of harm overwhelmingly favors granting the relief.

Again, I commend the ***Starcaps*** decision on this. It has a very well-reasoned decision about this, pointing out that if it turns out the arbitration should have been affirmed. In fact, in ***Starcaps*** ultimately the arbitration was affirmed. They pointed out that the players could then serve their suspension then. There's

no harm to any interest of the NFL. There's no harm to anything that happens there.

And, in fact, in ***Starcaps***, they did serve their suspension then. But the point was, the Court said, if I have significant fundamental questions that need to be answered, then I'm not going to allow irreparable harm, because, first, when there's no real harm to the other side. The other part of this balance is not just Mr. Elliott, it's the Cowboys.

So we have two affidavit and declaration in this case. One is from Mr. Elliott's agent, Mr. Arceneaux, that details the facts of irreparable harm and what it means to a NFL player and how this would impact him irreparably. And then we have the affidavit and declaration of Mr. Cohen, who is General Counsel of the Cowboys, that I believe is sitting out in the audience here in court today.

There are two significant things about the Cohen declaration. One, it establishes unequivocally the harm that will be caused, in addition to Mr. Elliott, to the Dallas Cowboys in an irreparable way if they are deprived of his services; and, in fact, not just to the Cowboys, but to their fans, their season ticketholders, others whose hearts and minds are locked up into this team, in terms of that. That's all set

forth in the Cohen declaration in terms of that.

And, secondarily, Mr. Cohen was at the arbitration and he heard and he saw and he reported that the revelation from Kia Roberts about what her conclusion was and how it wasn't something given to the advisors and how it was not something she gave to the Commissioner and how the Cowboys didn't know about it. The Cowboys didn't know about it. He confirmed that in his declaration. So why is that significant?

In the context of this arbitration hearing, this was clearly an effort to suppress evidence: The most fundamentally unfair thing. Now, how do I know that?

We didn't only ask for Ms. -- Ms. Roberts to testify -- I'm sorry. We didn't only ask for Ms. Thompson to testify before the Commissioner, we asked that Kia Roberts testify, but the NFL said no.

Here's what counsel said when they didn't want Ms. Roberts to testify. We're -- we're producing Lisa Friel and, therefore, Ms. Roberts' testimony will be cumulative of Ms. Friel's testimony.

Your Honor, you've been in courts a long time. What would you do if a counsel made that representation in your court and tried to use that to keep Ms. Roberts from testifying about what her

conclusions are, which they knew were diametrically opposed to Ms. Friel, and that Ms. Friel was the one who decided, with counsel, that Ms. Roberts or anyone's conclusions would not be in that evidentiary report so it would be kept from the player, from the Cowboys, from the Commissioner, I would assert, from the advisors? What does that do to the fundamental fairness here?

So, the balance of hardships, we believe, precisely favor maintaining the status quo; give this Court the time to study these issues; to have full briefing; to have argument, and then justice will be done.

I am going to conclude, Your Honor, by simply saying the following: The last fact is the public interest. And, again, I commend you to the ***Starcaps*** decision.

The public interest is vindicated when employees are not improperly suspended, disciplined without a fundamentally fair process. This is the rule of law.

You know, I noticed, when the crowd was coming in, we have some children in this room. I assume they're little Cowboys fans who came here to see Mr. Elliott.

Before Mr. Elliott gets suspended, and

everything that means for him as a player and his team and his reputation, before anyone in this process of arbitration can suffer those types of consequences, particularly in a policy like this, where the allegations are quite severe -- and, frankly, if someone engages in domestic violence, this Union believes there should be significant penalties. That's not the issue in this case. I would hope everybody would think that.

This is about somebody wrongly accused, where the investigators concluded there was no basis to go forward, and was denied a fair process.

I believe Your Honor should issue this TRO after the decision is rendered. You don't have to issue it now. I think it would be quite proper for you to wait till tomorrow; because now we have a representation from the League that the decision will not go into effect until next Tuesday, so therefore -- and by the way, that's a new representation from the League. But now that they have said that -- because I guess it's past their limit, in terms of that. Now that we know that.

Then you can issue your decision, and you will decide for yourself the time to carefully decide as a Court whether fundamental fairness existed here or whether it did not.

I believe that's the only just outcome, and I think it's the one that every Cowboys fan, every person, but most importantly and especially the accused, Mr. Elliott, deserves from the arbitral process.

Thank you very much.

THE COURT: Mr. Kessler, before you sit down, there's one question that you didn't really address just generally.

Because looking -- judicial review of these kind of decisions is extremely narrow, and you didn't really talk about that.

And I went back and read, which I had never read before, the ***Brady*** decision. Of course, the District Judge sided with you and your client.

Then the Second Circuit -- now, that's not binding upon this Court -- in reading the Second Circuit decision, I don't know one would ever have survived a District Judge vacating an award of the Second Court, based on reading that decision.

Now, we don't have that in our Court because the Fifth Circuit hasn't done -- I don't think they've ever reached the issue regarding the NFL. But it is extremely narrow what the Court looks at.

And so the Court, especially as Mr. Nash pointed out, and I think he's correct, he's got

evidentiary decisions, it has to be pretty severe to get over that hump.

So in terms of the small, narrow window the Court looks at, why -- why is this case -- that case that is of such a fundamental error that he was denied a fair hearing? If you don't mind just answering that question, considering because my review, if I reach that decision, is so narrow.

MR. KESSLER: Your Honor, I'm glad you raised ***Brady***. I meant to cover it, so I thank you for raising it.

I believe the decision in ***Brady*** is not only completely distinguishable, but it actually supports finding fundamental unfairness here, and I will explain why.

The fundamental fairness argued in ***Brady*** related to two things: The fairness to order the deposition of Jeffrey Pash, who was the General Counsel of the NFL, and the failure to produce certain of the investigator notes of the Paul Weiss law firm.

In that, those were the two fundamental issues. Everything else in ***Brady***, in the notice issue, have nothing to do with the issues here.

What the Second Circuit did is they reaffirmed, they didn't deny, that where the Arbitrator

refused to hear evidence pertinent and material to the controversy, there would be vacatur. In other words, the law in the Second Circuit is there would be.

But they looked at the specific facts there and they found two things. They found that Mr. Pash's testimony was collateral testimony because he had only minimum involvement in the investigative report. And Mr. Wells, who was the principal investigator, who had testified at length, and, therefore, what they said is that this was an issue that was collateral, and, therefore, didn't meet the standard of being evidence pertinent and material to the controversy.

Second, when they got to the investigator notes, they said the same things, that the League had already produced all of the NFL documents considered by the Investigators and that no material factual disputes that could be revealed by the Paul Weiss notes, in addition, had been identified.

So what the Second Circuit did is specifically accept the principle that if it was material and pertinent, they would have overturned the Arbitrator on that ground; but they said, these complaints were not.

Now, compare those issues, Mr. Pash's testimony, when he had his name in a press release

saying he was the co-investigator, but he then testified to Mr. Wells he never really did anything. So, therefore, the Court said his testimony was collateral, when all he did was review a draft and give some comments. So the Court said, well, that's not -- that's not central or pertinent or material.

And in Paul Weiss' investigative notes there, which the Court said had already been covered by everything else produced by the League, and compare that to the fundamental issue of credibility? Number one. When the Policy says credible evidence is the test and our burden, there could not be another witness more pertinent, more necessary, more material than Ms. Thompson. That is the fundamental difference on her.

Secondarily, because we uncovered this conspiracy to suppress evidence and we had this burden to show what the Commissioner knew and didn't know, so that we -- so that you wouldn't defer to him for things he didn't know, the Commissioner Goodell's testimony was directly essential.

So this came up in another proceeding involving Ray Rice, where instead of appointing Mr. Henderson as the Arbitrator, the League appointed a true neutral, because we were alleging bias, and they appointed former Judge Barbara Jones of the Southern

District of New York.

And Barbara Jones ruled that there Commissioner Tagliabue had to testify -- I'm sorry, Commissioner Goodell had to testify. She compelled it. She said why? Because his testimony -- and Judge Jones, in light of fundamental fairness, and she sat like you, in a District Court -- she said his testimony went to a central issue in the case of what the Commissioner knew and didn't know in the context of that dispute, because there, that was a controlling issue there, and she ordered the testimony, Commissioner Goodell testified, we met our burden, and the discipline was vacated.

That's what we've been deprived of here.

So I am happy for Your Honor to review the specific context of ***Brady*** and those rulings. And I would submit that had this case been before that panel in the Second Circuit, applying their own standards, they would have reached a very different conclusion on material and necessary, even though I agree with Your Honor, obviously that's another Circuit and does not in any way control, in any event. But the point here is, it's a fact-specific inquiry.

They also argue the ***Adrian Peterson*** case in the Eighth Circuit there the issue was retroactive application of a policy. And the Court of Appeals in

the Eighth Circuit ended up saying that the Eighth Circuit doesn't even recognize fundamental fairness as a separate grounds. So it differs from the Fifth Circuit. So, therefore, it's not applicable for that. And there's been a split in the circuits about that.

But secondarily said, what was argued there as being fundamentally unfair was just all being the retroactivity of the Policy, which they had already said was for the Arbitrator to decide under the agreement, which is why we lost in ***Peterson***, having nothing to do with anything here.

So, Your Honor, as you know, as it may well turn out to be the case, the standards are what they are. And we believe the clear issue is how do you apply them to the specific facts here.

We believe that at the very least we have raised substantial, difficult, important issues as to whether this testimony was material and pertinent. I'm using now the words of the FAA, which the Court of Appeals has said you look to, in interpreting the vacatur rules of fundamental fairness, that's the ***Gulf Coast Industries*** case.

THE COURT: Thank you, Mr. Kessler.

MR. KESSLER: Thank you.

Mr. Nash.

MR. NASH: Thank you, Your Honor.

It's been a long time.

Well, you just heard a lot of arguments about the evidence and the hearing, the testimony of various witnesses, the meeting of the standard under the Personal Conduct Policy that the Arbitrator is supposed to apply.

These are all arguments, Your Honor, that -- and I think you said you -- you read the transcript. It probably sounded familiar. And the reason they probably sounded familiar is that they were virtually a repeat of the very lengthy closing argument that counsel made at the end of the arbitration proceeding. And I would submit a couple of things about that. One is, it proved the point that I made earlier. These arguments are before the Arbitrator. These are the arguments that he made.

I got a chance to respond and that's also in the transcript. And, in responding, I got a chance to point out that the factual claims that he made about the so-called conspiracy about Ms. Roberts and what was provided to the Commissioner were not correct. That if the Arbitrator looked at the evidence, if he read the testimony or remembered the testimony of both Kia Roberts and Lisa Friel -- who, by the way, I believe

testified completely consistently -- they gave the same testimony.

Ms. Roberts was quite clear, because she was asked quite directly, she had concerns about credibility of -- of the witness. She expressed those concerns. She -- she documented those concerns. She put them in the investigative report. And both Ms. Roberts and Ms. Friel said directly, that was all included.

In fact, Ms. Roberts prepared a memo, which was Exhibit 99 to the investigative report, that counsel got to cross-examine her about, in which she outlined here are the credibility problems with Ms. Thompson.

Now, she also said she had a number of credibility problems with -- with what Mr. Elliott had to say, and that was also included in the report.

And to the point about the notes, and you correctly pointed out about the -- about the interviews that she conducted of Ms. Thompson, she did have the two interviews and then follow-up calls. She actually had -- they had recordings of those interviews. They had absolute verbatim transcripts of those interviews, and she had notes of the others, and -- and she was asked, I think it's on Page 249 and 250 of the -- of the

transcript: Did you include everything from your notes concerning your conversation with Ms. Thompson into the report?

She made summaries. It wasn't a verbatim transcript, but she actually summarized exactly what Ms. Thompson had told her. And she said, I included everything, everything.

So -- and -- and as far as the -- the information that went to the Commissioner, Ms. Friel testified that she, in fact, made sure all of that was included in the report to the Commissioner and that she herself told the Commissioner about Ms. Roberts' concerns.

We had this back-and-forth argument. I don't -- I would suggest, Your Honor, it -- it wouldn't be the Court's role to resolve those sort of factual questions: Whether I'm right, whether Mr. Kessler is right. He may get back up here and say, "Oh, no, no. She said this." But that's what the point of the arbitration hearing was about, and that is why we don't know, until the award is issued, how the -- how the Arbitrator is going to resolve that; nor do we know, nor do we know how the Arbitrator is going to resolve Mr. Kessler's arguments about this so-called credible evidence standard and whether it is, in his view, unfair

that the information that was provided to the Commissioner only had the interview summaries, he didn't meet directly with Kia Roberts, all of those -- all of those things, whether that was unfair.

And that, I would submit, Your Honor, whether this one was fair and consistent is a question about how the Policy is to be applied. And in that -- and I think we made this point in our -- in our papers and I think one thing is particularly clear.

I understand that Counsel believes that it wasn't sufficient in his view for all of the evidence about the credibility of Ms. Thompson and the credibility of Mr. Elliott to be put in the report that -- that, you know, Kia Roberts had to meet with the Commissioner; something like -- but that's a question about how the Policy is to be administered.

And in that respect and as I pointed out in my closing argument to Arbitrator Henderson and I think we pointed out somewhat in our brief, the thing that they leave out -- leave out is, is that after Ms. Roberts had expressed those concerns about credibility, there was -- there was additional proceedings, there was additional -- an additional interview of Mr. Elliott.

Now, keep in mind, when Mr. Elliott,

before I argue the case again, I feel some need to make a few of these points.

When Mr. Elliott was first interviewed by Kia Roberts at the beginning of the case, at that point, she didn't have all of the text messages that the League was able to collect.

She didn't have all of the photographs of the injuries that Ms. Thompson provided.

She didn't have the expert metadata that confirms Ms. Roberts' story -- I'm sorry, Ms. Thompson's story that the photographs were taken that week when she said they were taken.

And she didn't have all of the text messages that -- between -- between Ms. Thompson and others, where Ms. Thompson reported these things contemporaneously, making her arguably more credible.

And also the text messages that show that Mr. Elliott was not truthful to the police, was not truthful with Ms. Roberts when she first interviewed him, she didn't have that.

Ms. Friel had that after all of this when -- after these -- after the concerns that Ms. Roberts had about the witness' credibility or Ms. Thompson's credibility was put in the report. It was given to the Players Association, it was given to

Mr. Elliott's representatives, and then they had a further meeting where -- where Ms. Friel then had the opportunity to question Mr. Elliott about those -- those -- that additional evidence. That's information that Ms. Roberts didn't have. And there's a transcript of that in the record.

And, also, there's testimony from Ms. Friel in the arbitration hearing about the significance of that injury. How she found, and presumably the Commissioner found when he got to review the transcript -- because his letter, by the way, said that was one of the things he reviewed in making the disciplinary determination. It wasn't just the original investigative report, but it was also the subsequent transcript of the -- the meeting with Mr. Elliott and his advisors in which Ms. Friel was able to put before Mr. Elliott a number of contradictions and -- and to further develop the evidence, which leads --

THE COURT: Wasn't Ms. Roberts the only one to actually interview Ms. Thompson?

MR. NASH: Yes.

THE COURT: And so as a former prosecutor, she made certain findings about credibility there.

MR. NASH: She did not. She said she

didn't make any findings, that wasn't her role. She -- she -- she had -- and actually what she said, and this is important, this is -- one of their arguments has been that in order -- the only way anyone can make a credibility determination is to meet personally with the witness. And this goes to their confront-the-accuser argument, which I will get to in a minute.

But Ms. Roberts testified, as did Ms. Friel, that no, that's not the -- necessarily the way you can determine whether someone's telling the truth.

I think Ms. Roberts said, I don't know Tiffany Thompson. I don't know Ezekiel Elliott. He's not my husband, she is not my husband. I know when my husband is lying, but I can't just look at somebody and determine. So what I have to do is get their story and then I have to do all the legwork, which included all the other work that -- that she and Ms. Friel did over the course of the year, and -- and that was put into the report. So there's no question that she examined what Ms. Thompson had to say.

One of the reasons she brought it up is she wanted to make sure she had all of the evidence, one way or the other, so that the Commissioner -- so it could be put into the report for the Commissioner. So

it -- it -- and it was not her responsibility to make, and she said that quite directly as well.

Now, which leads to the, what I think will be, if we ever get there, Your Honor, if we ever -- if we ever get -- you know, once we get an award, if you're inclined to review it. What -- what the -- what one of the issues is going to be is what are the Arbitrator's findings about these issues. Which I think, under standard review, I think you know, is something that we shouldn't be in here retrying the case.

But maybe even more importantly, what is the Arbitrator's interpretation of the Collective Bargaining Agreement. And -- and that's where you get into when Counsel says, oh, this is not consistent with the CBA.

I mean, I think they say, by the way, in their -- in their brief that they submitted today, on a number of -- number of occasions, they say injunctive relief is required because he's being deprived of his CBA rights.

Well, the question of whether Mr. Elliott has been deprived of his CBA rights is for the Arbitrator. That's fundamentally an issue of contract interpretation.

So, you know, if Mr. Kessler is right about his interpretation of the Policy, the Arbitrator can agree with him.

Now, again, on that point, and we point this out, under the Policy, only the Commissioner may decide, make the ultimate decision that he says, you know, well, you should -- he should have -- it should be Kia Roberts, it should be Lisa Friel.

The investigators can have a disagreement, the members of the Commissioner's staff can have a disagreement about how to look at things, but ultimately, under the Collective Bargaining Agreement, under Article 46, it's the Commissioner's judgment that matters.

And -- and under the Personal Conduct Policy, it says quite clearly that the Commissioner can rely on a variety of information.

And the reason we know that, we submitted a decision to Your Honor attached to Mr. Gambrell's declaration. This was an issue we just had last year, when Commissioner Goodell announced the Personal Conduct Policy, he had originally contemplated using a disciplinary officer to make some of these decisions. And they said, you can't do that. Under Article 46 of the Collective Bargaining Agreement, only the

Commissioner can do that. That cannot be delegated to the staff.

So, one of the arguments I made to the Arbitrator, and I don't know if he's going to agree with me or not, it's going to be up to him to review the arbitration decision that we submitted to you, and he's going to determine the significance of all of these arguments under the Policy.

And that's where the ***Brady*** and the ***Peterson*** cases matter so much.

Now, I -- I -- when we talk about -- when we talk about fundamental fairness, I think I suggested earlier and, you know, when he relies on ***Gulf Coast***, that's -- that's just fine. Arbitrator didn't hold a hearing. That's fine. I think that's a pretty extreme case.

But there are other Fifth Circuit cases, I think including the chemical company case we cite, where the Fifth Circuit says it's not the Court's rule to look over the shoulder of the -- of the Arbitrator and second-guess these kinds of judgments.

The Supreme Court has said this repeatedly. They said it in the ***Misco*** case, they said it in the ***Garvey*** case. It is not for the Courts to come in and say, "Did you get this procedural question

right?"

And -- and this is -- and so in terms of there -- I understand that they want to -- and I think your point about the ***Brady*** case is exactly right. I -- I think it highlights the very important -- I mean, I think the Court there made it clear.

And there was a case where the District Judge reversed an arbitration decision, the Commissioner's decision in that case based on the FAA. Second Circuit said, no, no, no. In all of our cases -- their review is exceedingly high. It is not our job to review the merits in the dispute, the equities in dispute, and the procedural questions that arise out of the dispute.

And I would submit, Your Honor, no matter how they try to distinguish the ***Brady*** case, the issue that they challenged, we didn't get the notes, that's what they say about Kia Roberts. We didn't get the testimony of a particular witness. That's what they say.

And I don't think the Second Circuit could be clearer, and they did so in terms that while it's not a Fifth Circuit case, I would submit, it is -- it's full of Supreme Court's authority. I think it's grounded in Supreme Court authority. And I think it is

directly applicable here.

And -- and, again, they say -- and this gets to the very first point that Mr. Kessler said, these questions have to be evaluated in context. Well, I agree with that. And -- and they have to be evaluated in the context of the Collective Bargaining Agreement.

And so when he -- his essential argument is, he talks broadly about fundamental fairness that applies in all labor arbitration decisions. But he, I think, ignores how narrow that concept has been applied.

So in -- in both ***Brady*** and ***Peterson***, the courts actually wrestle with whether fundamental fairness is even a basis to vacate an arbitration award. And the reason they do that, Your Honor, I think you can see, would be obvious.

You start talking about fairness. You're down the road of sort of second-guessing the Arbitrator, and you're doing the things that the Supreme Court has repeatedly said, you know, a court ought not to do.

So -- and -- and in each of those cases, they said, you have -- and what's required is what's required under the Policy. So discovery, for example, witnesses. It's not a criminal case. It's not this idea that you -- you -- it's not fair if you don't get to confront your accuser.

By the way, one of the arguments that I made on this point to the Arbitrator was under the Policy, his -- his decision not to compel Ms. Thompson was fully -- not only is it fully consistent with the Policy because -- and I think he explains it in his decision and I think it speaks for itself -- but I pointed out to him in my closing argument, it's also consistent with the Policy that makes clear that victims who come forward and complain about domestic or dating violence are to be protected against harassment and bullying and the like.

And I -- and I argued to the Arbitrator not -- you know, not forcing her to come in and go through the kinds of things that we're -- we're talking about here today, which is fully consistent.

And so there's no -- there's no -- I think his decision was clearly grounded in the Policy. And it's not akin to ***Gulf Coast*** or cases where, you know, there's Arbitrator misconduct.

Keep in mind this whole fundamental fairness, it's borrowed, and I think he did identify the section of the FAA where it talks about Arbitrator misconduct.

THE COURT: Mr. Nash, what is the NFL's position on -- in domestic violence situations? Is it

the NFL's position that a witness should never be -- the alleged accuser ever be -- come to testify?

I mean, is it -- is it the NFL's position that there's never a situation where that testimony should be at a hearing by the Arbiter?

MR. NASH: Well, I would -- I would -- I don't know that I can answer in every single case, I can answer in this case; where as the -- as the Arbitrator held, the Commissioner's decision did not depend just upon Ms. Thompson's testimony or -- or interviews with -- with Ms. Roberts, it depended upon the entire record.

And that's why they went through the lengthy and detailed investigation that they did. That's why they got medical experts. That's why -- to confirm that the -- that the photos showed injuries that were consistent with what Ms. Thompson said happened. And -- and that's why they got Mr. Elliott's text and all that.

So, I think for purposes of certainly this case, it was well within -- and I think the question, the legal question is whether there's some, you know, right to the accuser -- right to confront the accuser that applies in every arb -- disciplinary arbitration..

Your Honor, there are disciplinary arbitrations that happen all the time where you don't get to necessarily confront your -- your accuser.

And the question is what -- whether under this particular Collective Bargaining Agreement that is something that is required. And that is a question of contract interpretation.

And one of the -- and so I understand your point that's a Second Circuit case and ***Peterson*** is in the Eighth Circuit. We also have other cases that we pulled up.

But we do have a case in Texas, Your Honor. We do have a case in the Northern District of Texas on this very point. It's Judge Fitzwater's decision in the ***Holmes*** case.

And I'm dating myself, because I -- I argued that case long ago. But there was a case where a player challenged his suspension under Article -- under this -- virtually -- now -- now, it was under the drug policy, and so things have changed somewhat, but the -- but the issue there was he was challenging his suspension.

His appeal was heard by the Commissioner. In that case, Commissioner Tagliabue. And he argued that he had a right to confront his accuser, he had a

right to all sorts of other evidence, and Commissioner Tagliabue made the judgment -- he made judgments. No, under that circumstance and those facts, he didn't grant those motions, and so he sued in Federal Court.

And Judge Fitzwater, in language -- and I think we quoted it, and I think we even have a block quote in language that's directly applicable here -- he rejected this very right-to-confront argument that he says applies to all labor arbitrations.

THE COURT: I'm not aware of that case. But I presume that case did not have a credible evidence standard that the Arbiter -- or the Commissioner would have to apply to find a violation of the drug policy?

MR. NASH: Well, whether it's a credible evidence case -- we are now also arguing about what the -- what the Policy -- what the -- you know, what the contract requires.

But it had a -- it certainly had a burden for finding a violation that had to be met. Okay? And so -- and the player argued, well, in order for me to meet, you know, my burden, I need certain -- you know, I need to confront witnesses, and the like.

And Commissioner Tagliabue said, no, that's not the way it works under this Policy.

And Judge Fitzwater said that's entirely

consistent -- that's -- that's a decision grounded in the Policy -- in the -- in the contract. And he said the only way, the only way for the -- for a Federal Judge to second-guess that kind of a decision is if he determines that the Arbitrator committed misconduct. And then he goes on to say, "And that would be a very rare circumstance indeed."

There is no allegation here that in making these procedural judgments that Arbitrator Henderson engaged in any kind of misconduct. He made a judgment.

And -- and one of the things is he said you've been given all this voluminous evidence. The purpose of this disciplinary appeal, it's not a de novo hearing on the -- on the underlying violations. There had been lots of prior meetings and evidence developed upon which the -- the Commissioner made his judgment. You've been given everything that -- that you're entitled to. And that's true for his decision not to compel testimony from -- from Com -- from Commissioner Goodell.

Those are just purely procedural questions, Your Honor.

THE COURT: Well, Mr. Nash, you know, looking at this issue, I would agree generally with this

premise that an accuser, in most situations, wouldn't have to be compelled to testify; but you have this additional fact, this theory that the Petitioner argues, about Ms. Roberts. And, of course, we have to look at that question in relation to was it fundamentally unfair not to have Ms. Thompson testify.

When we consider that the person who did the investigation -- and let's be fair to them -- is the NFL knew what she knew, but they did not know until the hearing.

I mean, and of course, their first -- you have the NFL saying that they don't want to produce her, saying she's cumulative. Clearly, she was not cumulative. And so that was wrong.

Second, you know, Ms. Roberts has certain opinions and she was kept out of certain meetings, including the meetings with the four advisors. She was kept out of any meeting with the Commissioner. And even with the four advisors, it is correct, Ms. Friel, the way she -- she crafts her answer like a lawyer does.

And so I don't think her answers, looking at her testimony, doesn't fully -- doesn't fully disclose to an -- being asked a question by one of the advisors, doesn't fully express the opinions given by Ms. Roberts.

Then we also have a situation of Ms. Roberts not -- her conclusions. And -- and I'll give you, none of the conclusions were in the report by Ms. Friel or by Ms. Roberts, but it's been represented in the past, the Com -- past reports have included that.

So their argument is there's some kind of suppression of this -- of this dissenting opinion.

And then we go to the question what did the Commissioner know. I know that's a separate issue, but it's the same fundamental issue here we're dealing with, is whether he should have been allowed to testify.

And that's -- the question is, is that fundamentally unfair that he wasn't forced to testify; when the fact is, we don't fully know what he was -- what he knows.

Ms. Friel's testimony is far from clear about every single aspect of Ms. Roberts' opinions.

So, yes, maybe he knows something, but we don't know the full extent.

So when you look at everything there, doesn't that change the situation about whether -- whether or not it is fundamentally unfair that Ms. Thompson and the Commissioner aren't forced to testify?

MR. NASH: I would suggest, Your Honor,

it's not, and I -- and I would most importantly say, those are -- you just outlined Counsel's arguments. Those are arguments that were made to the Arbitrator. Again --

THE COURT: And the Arbitrator -- I mean, the issue's ripe for me, at least for the purposes of the record. The Arbiter made decisions on that.

And so he denied Ms. Thompson appearing or ask the NFL to try to make that happen, and he denied the request to have the Commissioner come testify at the arbitration hearing.

The fact that Mr. Kessler made some argument about that, in terms of mitigation, well, that may lower -- that may lower the award maybe, or whatever he does on his -- if doesn't -- if he affirms the award but lowers the penalty. But those issues are already decided for this Court, in terms of examining whether that's fundamentally fair or not.

MR. NASH: Well, again, just a few things.

First of all, on the point about Ms. Roberts, the Arbitrator did compel her testimony, and I would --

THE COURT: Right. But over the -- I mean -- but -- and I'm not saying there is a conspiracy

or not. I'm just saying that that's their argument.

When you look at the whole series of events -- I mean, the NFL knows what Ms. Roberts knows, but they excluded her from the hearing.

MR. NASH: Your Honor, I have to -- one of the things that I think is unfortunate is how that accusations fly, and I think it's -- and I think it's just wrong.

You have to understand the context of -- of the internal appeals procedures that are followed here. These are expedited procedures. This -- the argument about, you know, what witnesses, how many witnesses, these are arguments that get -- that get resolved.

And, by the way, I think this is -- this may be the first time that more than one -- typically, it's the Lead Investigator; that's -- that's the practice. That was that basis of the NFL's objection not to have both; you can have Ms. Friel.

And, again, I think what -- what Ms. Roberts said was completely consistent with what Ms. Friel said.

So, I think the suggestion that there's some sort of conspiracy there is really wrong. And it was their argument they made to the -- to -- they made

that to the Arbitrator and -- and he can certainly resolve it. But it's simply wrong.

But again, Your Honor, the -- the other thing that I think has to be, you know, I think is just sort of wrong about this premise, is that their -- Ms. Roberts had -- had -- had a view about things before the end of everything, right before Mr. -- Mr. Elliott was questioned again. And she went out of her way not only to include all of that -- all of the evidence that supported the views that she had, but she prepared a memo on it.

And -- and when -- when I think you said that they didn't know. They were given all of this. And -- and I don't -- and so it's now up to the Arbitrator to decide whether -- you know, whether that was sufficient under the Policy. I would argue that it absolutely was, because it was not Ms. Roberts' decision to make, it was the Commissioner's decision to make.

And I think I would argue that the fair reading of Ms. Friel's testimony is, is that all of that was provided to the Commissioner. I just -- I mean, you may have a different way to read it, but I argue that she absolutely --

THE COURT: No, I think her words are, well, not in so -- "not in the words they're using," or

"not in so many words," or something of that nature.

I mean, I've read it.

And so Ms. Friel, again, gives very lawyer-like answers and clearly does a good job of that.

But it is unclear reading that exactly what was told to the Commissioner in terms of the details of what Ms. Roberts said.

And, again, you haven't answered the question; and maybe because I spoke so long and it wasn't clear.

The question I'm asking you is, is that why does not the fact of all of these series of events about the handling of Ms. Roberts, why doesn't that make it fundamentally unfair and change the situation where nobody would bring the accuser into a hearing, well, then it becomes fundamentally unfair when you have all those sequence of events.

Those are events that are very different that you normally wouldn't see.

So why doesn't that change it and make it fundamentally unfair to both the Commissioner and Ms. Thompson, when the ultimate decision is credibility?

MR. NASH: Well, again, this is the argument that they made to the Arbitrator. And the standard of review hearing in arbitration --

THE COURT: What I am saying is, I mean, for me -- I'm not saying what the decision is. What I'm saying is, let's assume I accept that argument, accept that -- I accept that argument. You're right, the Arbiter, Mr. Henderson, made a decision. And if I make that decision, it's an error.

The question is: Is the error so much that it's fundamentally unfair?

Because procedural errors are fine unless it becomes fundamentally unfair and causes prejudice.

So assume for me that that's the case. So tell me why that wouldn't be fundamentally unfair if I -- if we presume there are some conspiracy or -- and why those two witnesses shouldn't have been forced to testify.

MR. NASH: Well, I think the answer is in the Arbitrator's written decision on this very point.

He issued a written decision as to why Ms. Thompson would not be required to testify. First of all --

THE COURT: But he also made that decision before everything got flushed out regarding Ms. Roberts, too.

MR. NASH: Well, they were free to -- I mean, they made that argument. I mean, they -- I mean,

all of these arguments were made.

I think if you go through the record, they have made all of these arguments, they renewed those arguments. So I don't think there's any ques --

And, again, for all I know, the Arbitrator will agree with your assessment of what's fair, or he'll agree with your way of reading Ms. Friel's testimony, or he'll have a different way of, you know, reading Ms. Friel's testimony. I -- I don't know the answer to that.

What I can say, Your Honor, is -- and this -- again, this gets back to, I think it's Judge Fitzwater's decision, but I think it gets really back to what the Second Circuit said in ***Brady***.

I mean, I have to say, I had a similar conversation like this with the District Court Judge in the ***Brady*** case, where the Court was trying to evaluate the evidence and try to figure out what was fair, and I -- and I gave some of the same answers.

And I think -- I think that, frankly, the Second Circuit said, yeah, that is for the Arbitrator.

So I would submit, Your Honor, the answer -- we don't know the answer until you have -- until -- until the award is issued. We're arguing about what the Arbitrator might do.

But I would suggest that certainly what he's already done, as long as -- as long -- and the law is clear on this, as long as his decision is grounded in the Policy. Okay. Which it clearly was. He says that quite clearly about what's required under Article 46.

THE COURT: And I understand, Mr. Nash, that these procedural errors they're asserting have to rise to a certain level, and that's the reason I'm asking these questions of why -- and I think I started by questioning, saying that I agree that generally having an accuser come testify probably wouldn't be necessary.

But the question is, is that looking at the whole body of the work here, it raises questions. And so --

MR. NASH: Well, let -- let me -- let me follow up on that point with this, Your Honor.

And that goes to --

THE COURT: And, Counsel, remember, we're here on injunction. So this is not whether I -- I can grant summary judgment. Which, if this case stays here and everything, I mean, at some point, that could be the case where I have to decide it on competing summary judgments.

We're not there yet. That's not the --

it's not that high of a standard for likelihood of success on the merits.

MR. NASH: Well, that's what I was going to address --

THE COURT: Go ahead.

MR. NASH: -- is likelihood of success on the merits.

I think that Counsel did not accurately state the standard. This idea that they just have to raise substantial questions, this idea that they just can come in and try to have confusion about who said what and this might not be fair and, you know, all -- all these kinds of arguments, that is not the standard in the Fifth Circuit. They rely on the ***Terex*** case for that. And that's an unpublished decision, Your Honor, in which, you know, the Court noted, I think at the time -- this was from 2006 -- that the standard for likelihood of success was not as -- not that settled.

Since -- it has since actually been quite settled, and we -- and we point that out with a number of cites. I think the ***Voting for America*** case that we cite makes it clear that they have to make a clear showing, not just raise some --

THE COURT: The Court is well aware of what the standard is in this Court and the Fifth Circuit

and the Court has had a number of opportunities to issue injunctions or deny injunctions. So I understand what the -- what the standard is.

MR. NASH: Okay. I just wanted to -- because I just think the way Counsel described it wasn't -- wasn't -- wasn't quite accurate.

THE COURT: I understand.

MR. NASH: Your Honor, I -- I -- I -- what -- what I -- what I want, I guess, to address in the remaining time, unless you have further questions on this point, is the argument that you heard at the end about -- well, there are two points. One, just a point of clarification.

He started his argument about the ***DelCostello*** case. It is ***DelCostello***, the part about exhausting remedies under the LMRA. And that -- that's a case where it involved whether an employee tried to pursue arbitration. That's not our case.

Under labor law, you may know from other cases, employees generally don't have the right themselves to pursue a case to arbitration; it's usually the Union under a Collective Bargaining Agreement that gets to decide.

So in DelCostello what was at issue there, if an employee goes to his Union and says I want

to grieve and the Union says no, we're not going to grieve, that's exhausting the remedy. That's not what we have here, where they go through the arbitration and they want to, you know, look -- they don't get an award and they run to court.

But the last point is this balance of harms issue. And I guess what I want to say about that is that -- and I want to present this -- I understand that Mr. Elliott is a star player. I think we cite the case -- the Supreme Court case, the ***Brown*** case that, you know, football players are not different than -- than other employees, they don't -- they don't get different standards in these matters.

But in terms of the balance of harms -- and I think they said this themselves in the ***Pennel*** case -- that this time -- an injunction at -- at this stage would be a blatant interference with the Collective Bargaining Agreement that we have.

And when they talk -- I thought it was interesting that Mr. Kessler talked about the ***Starcaps*** case, and that's the ***Williams*** case, by the way, in the Eighth Circuit, and he talked about how, I think the District Judge, Judge Magnuson, granted him a preliminary injunction.

What he didn't tell you -- and he's got

convinced by these arguments about, you know, irreparable harm -- what he didn't tell you is several months later, the Court granted summary judgment and dismissed the case and said that the representations made at the injunction hearing were not borne out by the record.

And then that went on to the Eighth Circuit. And, again, that's -- the Eighth Circuit's decision in ***Starcaps***, the ***Williams*** case, is one of the consistent line of cases, the consistent line of cases that under this Collective Bargaining Agreement, under this article of the Collective Bargaining Agreement, that says that the Courts should not interfere with the disciplinary process.

And I would -- I would submit, Your Honor, that there is absolutely a harm to -- to the NFL. Because if you get to improperly use the Courts to interfere with the appeals proceedings -- procedures that the parties have agreed to, you get to manipulate the suspension; you get to -- you get to determine what -- what teams the player gets to play against.

There are other teams that have issues. I mean, there is a very strong -- and this is a fundamental, I think, interest of -- in labor law. And -- and -- and I guess it's particularly obvious

here, I would submit. It's obvious here for the simple reason that, as I said before, this is not the first time we've been here.

This is a, frankly, an attack that the Players Association has used in many of these suspensions. And in every case, every case, it was ultimately determined -- and we have a decision from the Tenth Circuit in the ***DJ Williams*** case; two cases in the Eighth Circuit; the ***Brady*** decision in the Second Circuit, as I said, the ***Holmes*** case in the Northern District of Texas, in every case, either at the District Court level or ultimately, ultimately it was determined that the Federal Courts are not sitting here to make the kinds of decisions about who gets to play against what team; or who should be suspended for how many games or -- or the like. And so I would submit that --

THE COURT: That's not what the Court is being called upon to decide.

The Court is -- although ***Gulf Coast*** is a very different opinion in terms of the facts, it's whether or not the arbitration proceedings were fundamentally unfair. That's what the Court is being asked to do.

MR. NASH: Well, I -- I would submit, Your Honor, that that's not quite that far, only because

what you are currently being asked to do is interfere with the enforcement of the Collective Bargaining Agreement. Ultimately --

THE COURT: Right, but that is my question -- that is a question, likelihood of success of on the merits, is I do believe, under the standard of likelihood of success, is it enough to at least grant the injunction and then go to full briefing on the summary judgment later?

MR. NASH: And I would submit, Your Honor -- and again, I'm glad you've looked at ***Brady***.

I think if you looked at ***Peterson***, if you looked at the ***Holmes*** decision, I think, Your Honor, this is -- and if you compare it -- compare it to the cases that they say is the standard --

THE COURT: I have read ***Brady*** and ***Peterson***, but I didn't see any of these cases having the facts that are in this case. It's a different set of facts.

And I keep coming back to it, asking you to tell me why the whole Roberts situation doesn't change the situation of a normal case.

And I know you want to minimize that; but there's just a series of events that I can't necessarily ignore.

MR. NASH: Your Honor, with respect -- I would submit you're getting a very distorted view of the facts.

And -- and this is what was argued. And -- and under -- under federal labor law, the determination of the facts are within the province of the Arbitrator.

And, again, this could not be -- and the Supreme Court said this, I think, in the ***Garvey*** case. Even if the Court thinks what the Arbitrator decides on the facts was wrong, if you disagree, if you might say, you know what, I don't think these facts are exactly -- you know, I don't -- I don't agree with this, you can't second-guess that.

So, again, I think, look, for all I know, their version of the facts may carry the day with the Arbitrator; but I think, respectfully, that is -- the law is quite clear that it's -- that it's for him to decide.

THE COURT: Well, I mean, the issues that have been raised before this Court in the injunction and in the complaint are issues he's already decided. So the issue of denying the witness -- either of those witnesses to testify.

MR. NASH: Well, I think on denying the

witnesses to testify, I -- I take your point. I don't disagree.

I think I would just suggest if you look at his decision, the basis for his decision, I -- I think that under -- under the law, it's clear that that's the kind of decision that -- it's clearly grounded in the Policy. It's clearly grounded -- by the way, based on his lengthy experience, and I think Mr. Kessler said this in his opening statement, that he was happy to have Mr. Henderson do this. He had a lot of experience in these cases. Sometimes Mr. Henderson has changed the discipline, sometimes he's affirmed it.

But based on his experience and understanding of the Policy and his interpretation of the Policy in the CBA, as long as he makes a judgment about who gets to testify or who should testify, respectfully, that really has to be, under the law, the end of the matter.

The other arguments about, you know, Kia Roberts and the like, he hasn't decided yet. This argument about whether it was fair, you know, that -- that the evidence that she -- or the facts that she based her opinions on was -- was specifically included in the report, it was included in a separate memo. Her concerns were communicated to the Commissioner. And --

and additional evidence was developed, including evidence from Mr. -- Mr. Elliott that -- that cast out his credibility, all of that, all of that has been before the Arbitrator now.

And -- and so the -- I think the issue that you're wrestling with is certainly an argument, I think it's the primary argument, that counsel here made in his closing arguments about why he didn't think that the suspension was fair. And maybe the Arbitrator will agree with him, maybe he won't, I don't know. We don't until -- until he decides.

THE COURT: Thank you.

MR. KESSLER: Your Honor, we've been here a long time, and I'm only going to be three minutes, I promise.

First, I have news: Arbitrator Henderson has issued his decision. That's why I was looking at my Blackberry, for which I apologize to the Court, and he has sustained the suspension, as I predicted. And as I predicted, his decision is based on the notion that he must defer to the fact-finding of the Commissioner.

And that would clearly demonstrate that the Commissioner did not have the right information before him.

We were fundamentally deprived of the

right to challenge the credibility, to challenge what the Commissioner knew.

I think when you see his decision, which obviously we will get to you right away, you will see that precisely what the Arbitrator did is how we were deprived, the burdens we faced under this policy. So that's important news.

This is now obviously ripe. The suspension will go into effect if you do not rule. And so I would urge you to rule as promptly as possible.

Secondly, you heard from Mr. Nash talk about, well, it's not misconduct.

Well, the Fifth Circuit in the ***Gulf*** case defined what fundamental -- fundamental unfairness was and what the misconduct meant. And the misconduct is not just corruption or something like that, it is improperly depriving the litigant, the person in the arbitration, of the evidence that's necessary to adequately present your defense.

Your Honor's questions were right on point, so I'm not going to argue anything more about that.

Finally, with respect to ***Holmes***. ***Holmes*** was a drug policy case, it wasn't under a he-said/she-said discipline policy, and it was not under

a credible evidence standard.

Your Honor's questions, again, were right on point. There has never been another case like this.

Under these facts, under this record, I believe you will find that there's been more than enough here to say this may be fundamentally unfair so that you should maintain the status quo, and let us fully brief and present these important issues to you.

Unless Your Honor has any other questions, I'm going to sit down.

THE COURT: No, I don't. Thank you. Thank you, Mr. Kessler.

MR. KESSLER: Thank you, Your Honor.

THE COURT: I would ask that one or both sides, someone submit that and file a supplement.

And then the question is, now that the decision has been issued -- and especially you've had the advantage over probably all of us -- everyone here with a Blackberry probably also knew -- but any additional briefing you want to do, I'm on a quick timeline now, so the question -- if you want to file anything additional, you can do by 5:00 p.m. tomorrow, either side, if you want -- if you want to. You don't have to. I'm not asking you to do so, I'm just giving both sides the opportunity if you want to indicate how

the -- how the Mr. Henderson's decision impacts anything with the Court.

With that being said, I understand I have a time deadline, so I will issue a decision by probably 5:00 p.m. on Friday, which won't interfere --

Again, I'm asking again, nothing interferes with his ability to play this weekend, so those representations were made. So I will issue a decision on how I'm going to proceed, whether I have jurisdiction or ultimately the merits of the injunction.

Anything further from the Petitioner?

MR. MELSHEIMER: I would just say, Your Honor, thank you. I know you've been in trial all day. We really appreciate it, on behalf of the Players Association and Mr. Elliott, for all the time -- the two-and-half hours you devoted to this.

MR. KESSLER: I was just going to say the same thing, I'm a guest in your Court, Your Honor, and I am very grateful for the time and effort you put in at the end of a long trial day. So thank you.

MR. GAMBRELL: Your Honor, I will just say "thank you."

THE COURT: Okay. Well, you know, it's my job. So I love my job, so that's not -- I'm just doing my job.

Unfortunately, we have to do it so late because I am in the middle of a 12-day trial, so...

But I will thank the parties, because if the decision had come out by 4:00 p.m., I don't know that my staff would have left tonight.

So I have until Friday so it gives me more time to process all these materials.

So we will be -- I guess we'll adjourn for the day until I resume court tomorrow at 9:00 a.m.

Thank y'all very much.

COURT SECURITY OFFICER: All rise.

(Proceedings concluded.)

C E R T I F I C A T E

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/_____ Date: 9/10/17

Judith G. Werlinger
FAPR CSR RMR CRR CMRS
TCRR TMR

Concordance